

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**CHARTER COMMUNICATIONS (SUCCESSOR
TO TIME WARNER CABLE OF NYC),**

Employer,
and

BRUCE CARBERRY,

Case 02-RD-220036

Petitioner,
and

**LOCAL UNION NO. 3, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS**

Union.

OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

Local Union No. 3, International Brotherhood of Electrical Workers (the "Union") submits this opposition to the request for review submitted by Charter Communications (Successor to Time Warner Cable of NYC) (the "Employer") joined by Petitioner Bruce Carberry ("Petitioner") *via* a three-sentence "me too" request for review filed minutes after the Employer' submission.¹

The Board should deny review.

Section 102.71(b) of the Rules and Regulations of the National Labor Relations Board ("Board") provides that review of an action by a regional director directing that a proceeding on a petition be held in abeyance due to the pendency of unfair labor practices "may be granted only upon one or more of the following grounds:"

¹ The Employer is simultaneously engaged in negotiations with the Union while it takes the lead, with Petitioner only tagging along, in urging the Board to cut short the Regional Director's investigation into unfair labor practices that interfere with employee free choice and hurry towards a decertification election.

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) There are compelling reasons for reconsideration of an important Board rule or policy.

(3) The regional director's action is, on its face, arbitrary or capricious.

29 C.F.R. § 102.71(b). None of these grounds apply to the Regional Director's decision to hold in abeyance the processing of the petition in this matter. (A copy of the Regional Director's October 16, 2018 Letter is annexed hereto as Exhibit "A").

First, the Employer argues that the Regional Director "has departed from officially reported Board precedent." (Er. RFR, p. 2).²

Board precedent is clear, and conceded by the Employer in a footnote (Er. RFR, p. 5, fn 10). The Board will hold in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, "if proven, would interfere with employee free choice in an election, were one to be conducted." *NLRB Casehandling Manual, Part Two, Representation Proceedings*, Sec. 11730, *et seq.*; *Wellington Industries, Inc.*, 359 NLRB 246 (2012); *see also, Linwood Care Center*, 365 NLRB No. 24 (2017) (In concurring to hold a petition in abeyance, Acting Chairman Miscimarra "acknowledge[d] that the Board has declined to materially change its blocking charge doctrine").³

In the subject determination, the Regional Director explained, in part, that the:

...alleged conduct may reasonably discourage striking employees from exercising their *Laidlaw* rights, effectively forfeiting their right to vote in a decertification election, given the underlying strike has

² References to "Er. RFR, p. _" are to the Employer's Request for Review.

³ The Employer and Petitioner have not asserted that there are compelling reasons for reconsideration of the well-established blocking charge doctrine as a ground for review under Section 102.71(b)(2) of the Board's Rules and Regulations.

exceeded one year. Further if employees were unlawfully denied reinstatement and/or terminated, and if an election was held prior to a determination in this case, those employees would effectively be denied their right to vote in the election.

(Exhibit A, pp. 1-2). Consistent with Board precedent, the Regional Director therefore directed that the processing of the petition be held in abeyance.

The precedents referenced by the Employer in support of its request for review under Section 102.71(b)(1) of the Board's Rules and Regulations concern, almost exclusively, a different doctrine with different standards. Specifically, the Employer confuses the applicable analysis by quoting, at length, irrelevant decisions addressing whether *postelection objections* warrant setting aside board-supervised elections. *Delta Brands, Inc.*, 344 NLRB 252 (2005) (applying standard for *postelection objections*); *Columbus Transit, LLC*, 357 NLRB 1717 (2011) (same); *Washington Fruit & Produce Co.*, 343 NLRB 1215 (2004) (same). This proceeding on the petition is in an entirely different posture from the precedents put forward by the Employer and different standards apply.

Second, the Employer conveniently truncates the relevant standard for its final asserted ground for review and argues that the Regional Director's "action is arbitrary capricious in blocking the petition and failing to proceed to a decertification election..." (Er. RFR, p. 2). It then continues to speculate as to what evidence the investigations into the unfair labor practices have revealed, complete with sworn certifications from the Employer's attorney and General Counsel.

However, review under Section 102.71(b)(3) may only be granted when "[t]he regional director's action is, *on its face*, arbitrary or capricious." (emphasis added). The wisdom of this provision is obvious, considering neither the Employer, nor the Petitioner, is in a position to conclusively attest to the scope of the evidence uncovered by the Regional Director's ongoing investigations into the blocking unfair labor practices. The Employer's extrinsic factual

characterization about what it speculates to be the extent of the evidence or the bounds of the Regional Director's investigations should not be considered by the Board when determining the Employer's request.

The Regional Director's direction to hold the petition in abeyance is not arbitrary or capricious on its face. The Regional Director succinctly explained each of the unfair labor practice charges blocking the petition and its conclusions about how the alleged conduct, if proven, may reasonably interfere with employee free choice in an election. (*See*, Exhibit "A," pp. 1-2). The Regional Director's decision expressly noted that the "alleged conduct may reasonably discourage striking employees from exercising their *Laidlaw* rights, effectively forfeiting their rights to vote in a decertification election." (Exhibit A, pp. 1-2). If proven, the unfair labor practice allegations could very well have a chilling effect, interfering with employee free choice and implicating the voting eligibility of far more than the five (5) individuals referenced throughout the Employer's submission.

The Employer concludes with a quotation from a dissenting opinion which, by definition, is not controlling Board precedent that could be binding on the Regional Director for purposes of Section 102.71(b). In other words, any departure by the Regional Director from a dissenting opinion of the Board does not supply a ground for review.

The Employer and the Petitioner do not raise any other grounds for review of the Regional Director's action.

Based on the foregoing, the Union respectfully requests that the Board deny review.

Dated: November 5, 2018
Melville, New York

Respectfully submitted,

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EXHIBIT A



United States Government

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October 16, 2018

By Regular Mail and Email

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Re: Charter Communications
Case No. 02-RD-220036

Dear Mr. Margolis:

This is in response to your request for the reasons relating to the decision to hold in abeyance the processing of the petition in this matter.

The petition was filed by Bruce Carberry on May 10, 2018, and an initial pre-election hearing was scheduled for May 21, 2018. International Brotherhood of Electrical Workers, Local 3 (IBEW, Local 3), filed charges against the Employer in Case Nos. 02-CA-220539 and 02-CA-220553 on May 17 and 18, Case No. 02-CA-222166 on June 15, 2018, and Case No. 02-CA-223159 on July 2, 2018, alleging violations of Section 8(a)(1), (2), and (3) of the Act.

In Case Nos. 02-CA-220539 and 02-CA-223159, the Union alleges Charter Communications (the "Employer") violated Sections 8(a)(3) and (1) of the Act by engaging in the following conduct in response to striking employees' unconditional offers to return to work: 1) refusing to reinstate striking employees to their former positions; 2) refusing to allow striking employees to remain subject to recall for the same or substantially equivalent positions; 3) failing to inform striking employees of their recall status and/or position; 4) threatening and coercing employees in exercising their *Laidlaw* rights; 5) terminating striking employees because they have engaged in protected activity, including exercise of their *Laidlaw* rights; and 6) notifying and claiming employees have resigned their employment, because they engaged in protected activity, including exercise of their *Laidlaw* rights. Such alleged conduct may reasonably discourage striking employees from exercising their *Laidlaw* rights, effectively forfeiting their

right to vote in a decertification election, given the underlying strike has exceeded one year. Further, if employees were unlawfully denied reinstatement and/or terminated, and if an election was held prior to a determination in this case, those employees would effectively be denied their right to vote in the election.

The charge in 02-CA-220553 alleged conduct of a nature which directly impacted the validity of the decertification petition itself, i.e., that the Employer, by its officers, agents and representatives, including but not limited to Carberry, a supervisor and/or management employee and/or employee overtly aligned with management, solicited support for decertification of the Union, in violation of Section 8(a)(1) of the Act. Therefore, based upon a consideration of all the circumstances involved, including the timing of the filing of the charge relative to the scheduled hearing date for the petition, the hearing was rescheduled to May 23, to permit the parties to introduce evidence relevant to the alleged supervisory status of Petitioner Carberry.¹ The subsequent charge in 02-CA-222166, filed on June 15, similarly raised issues regarding the appropriateness of the continued processing of the petition. In that case, the Union alleged the Employer unlawfully furnished Petitioner Carberry with legal services in direct connection with the decertification petition. Such alleged conduct amounts to unlawful employer assistance to the petitioner and would taint the petition and showing of interest. A Decision and Direction of Election in Case No. 02-RD-220036 was issued on June 15, 2018. However, the scheduling and conduct of the election was blocked due to the pending related blocking charges in Case Nos. 02-CA-216533, 02-CA-220539, and 02-CA-220553.

Based upon an evaluation of all the circumstances involved in these cases, including the evidence secured during the investigation of these cases, I have concluded that the processing of the petition in this matter should continue to be held in abeyance pending disposition of the related unfair labor practice charge(s) in Case No(s) 02-CA- 220539, 02-CA-220533, 02-CA-222166, and 02-CA-223159.

Right to Request Review: Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. The request for review must contain a complete statement of the facts and reasons on which it is based.

Procedures for Filing Request for Review: A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business (**5 p.m. Eastern Time**) on October 30, 2018, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than **11:59 p.m. Eastern Time** on October 30, 2018.

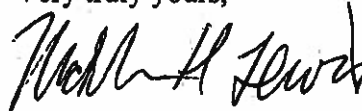
Consistent with the Agency's E-Government initiative, parties are encouraged, but not required, to file a request for review electronically. Section 102.114 of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

¹ This charge was withdrawn on July 5, 2018.

Filing a request for review electronically may be accomplished by using the Efiling system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Very truly yours,



Nicholas H. Lewis
Acting Regional Director

cc:

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CERTIFICATION OF SERVICE BY EMAIL

I certify that on November 5, 2018, I served the foregoing Opposition to Employer's Request for Review on behalf of Local Union No. 3, International Brotherhood of Electrical Workers upon:

John J. Walsh, Jr., Esq.
Regional Director, Region 2
National Labor Relations Board
Jack.Walsh@NLRB.gov

G. Peter Clark, Esq.
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by email addressed to said parties at the email addresses above set forth, being the addresses designated by said parties for that purpose.

Melville, NY
November 5, 2018



Paul K. Brown